

BIS Issues First FAQs for Chinese Supercomputing and Semiconductor Manufacturing Export Controls

Article By:

International Trade Practice at Squire Patton Boggs

On Friday, October 28, 2022, the U.S. Commerce Department's Bureau of Industry and Security ("BIS") issued its first Frequently Asked Questions ([FAQs](#)) regarding the Interim Final Rule, [87 Fed. Reg. 61286](#), entitled "Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification." These FAQs cover the following topics: the applicability of the new restrictions on exports and reexports to Hong Kong and Macau; the definition of fabrication "facility;" deemed export/reexports; U.S. person definition and restrictions; licenses; and encryption.

Background

On Thursday, October 13, 2022, the BIS published in the Federal Register an Interim Final Rule, 87 Fed Reg. 62186, amending the Export Administration Regulations (EAR) (15 CFR parts 730-774) to impose new export controls on Chinese advanced computing integrated circuits (ICs), computer commodities containing such ICs, and certain semiconductor manufacturing items. For more information on these controls, see our blog post [here](#).

These controls, all of which are currently effective, include:

- New Foreign Direct Product Rules, as outlined in EAR § 734.9, including Entity List Modifications
- New license requirements for export to China of certain advanced computing semiconductor chips and semiconductor manufacturing items, as outlined in EAR § 742.6
- U.S. Persons "Support" Modifications that Implicate General Prohibitions in EAR § 744.6
- New Supercomputing and Semiconductor Manufacturing End Use and End User Controls, as outlined in EAR § 744.23

FAQs

- ***Are the new restrictions on exports and reexports to China also applicable to Hong Kong and Macau?***

On December 23, 2020, BIS published in the Federal Register a Final Rule, 85 Fed. Reg. 83765, removing Hong Kong as a separate destination from China under the EAR. Accordingly, these new license requirements on exports and reexport to China also apply to Hong Kong. However, BIS treats Macau as a distinct destination from China and, therefore, it is not subject to license requirements specific to China. BIS recommends, however, that exporters and reexporters conduct due diligence and be aware of red flags when shipping to Macau.

Semiconductor Fabrication Facility

- ***The term semiconductor fabrication “facility” is used a number of times in the advanced computing rule but is not defined in the Export Administration (EAR). Does this term refer to the fabrication “facility” at the beginning of the process, e.g., where the technology node is created, or to the Outsourced Semiconductor Assembly and Test (OSAT) facility at the end of the semiconductor manufacturing process?***

EAR § 772.1 defines “facility” as “a building or outdoor area in which people use an item that is built, installed, produced, or developed for a particular purpose.” Accordingly, a semiconductor fabrication “facility” is “a building where the production at the restricted technology level occurs.” The new export controls do not cover “subsequent steps at facilities, such as assembly, test, and/or packaging that do not alter the technology levels.”

- ***Does the term fabrication “facility” include different production lines in the same building or lines in different buildings on the same company campus, such as a company campus where one building on the campus is doing the 14 nm work and another building on the same campus is doing the 28 nm work – are the two buildings considered the same facility or are they to be considered separate facilities?***

Each building on the same company campus with the same address and/or part of the same legal entity is considered to be a separate facility. However, parties should exercise sufficient due diligence to ensure their item or activity is only for an unrestricted fabrication.

If the same building houses both a restricted and unrestricted line, the building is subject to the new controls.

Deemed Exports/ Reexports

- ***How does the advanced computing rule affect deemed exports/reexports?***

The regional stability (RS) controls placed on the new and revised ECCNs in EAR § 742.6(a)(6)(ii) do not apply to deemed exports/reexports. However, all of these ECCNs (as well as their associated technology/software) are controlled for anti-terrorism (AT) reasons, which are not exempt from

deemed export/reexport requirements. Accordingly, a license is required to export, reexport, or transfer (in country) to or within AT-countries, which include Iran, North Korea, and Syria.

A foreign person who lawfully received technology or software source code prior to the effective date of the new ECCNs does not need a new license or authorization. However, if a foreign person is receiving different technology or software source code – even if classified under the same ECCN – then a new or additional authorization is required.

Restrictions on U.S. Person

- ***Who is a “U.S. Person” subject to the license requirements in § 744.6(c)?***

U.S. person is defined in EAR § 722.1. For purposes of § 744.6(c) of the EAR described below, the term U.S. person includes:

- Any individual who is a citizen of the United States, a permanent resident alien of the United States, or a protected individual as defined by 8 U.S.C. 1324b(a)(3);
- Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; and
- Any person in the United States.

BIS also notes the definition of “person” in EAR § 772.21, which includes “A natural person, including a citizen or national of the United States or of any foreign country; any firm; any government, government

agency, government department, or government commission; any labor union; any fraternal or

social organization; and any other association or organization whether or not organized for profit. This definition does not apply to part 760 of the EAR (Restrictive Trade Practices or Boycotts).”

- ***What activities of U.S. persons require a license under § 744.6(c)(2) of the EAR?***

For items not subject to the EAR used in the “development” or “production” of integrated circuits at fabrication facilities in China that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR, the U.S. persons control in § 744.6(c)(2) apply to persons who:

1. Authorize the shipment, transmittal, or in-country transfer (in-country) of such items;
2. Conduct the delivery, by shipment, transmittal, or transfer in-country of such items; or
3. Service, including maintaining, repairing, overhauling, or refurbishing such items.

For any item not subject to the EAR that meets the parameters of any ECCN in Product Groups B, C, D, or E in Category 3 of the Commerce Control List, these license requirements apply even when the U.S. person does not know whether the activity is for a facility that fabricates integrated circuits that meet the criteria in § 744.6(c)(2)(i)(A)-(C).

These restrictions do not extend to U.S. persons conducting administrative or clerical activities (e.g., arranging for shipment or preparing financial documents) or otherwise implementing a decision to approve a restricted shipment, transmittal, or in-country transfer, or development or production activities that are not directly related to the provision of specific items to or servicing of specific items for advanced Chinese fabs (i.e., those developing or producing integrated circuits meeting the criteria in § 744.6(c)(2)(i)(A)-(C)), absent evidence of knowledge of a violation by those persons.

U.S. persons should conduct appropriate due diligence to assess whether a fabrication “facility” in China fabricates integrated circuits meeting any of the criteria set forth in § 744.6(c)(2)(i)(A)-(C). Appropriate due diligence should include a review of public information, the capability of items to be provided or serviced, proprietary market data, and end-use statements. U.S. persons should follow the “Know Your Customer” guidance in Supplement No.3 to part 732 of the EAR and the additional guidance found on BIS’s website, available [here](#). U.S. persons can also submit Advisory Opinion requests to BIS pursuant to § 750.2 of the EAR for guidance on specific fabrication facilities.

- ***How should companies file applications for U.S. person support activities? Is it possible/appropriate to use SNAP-R for this?***

U.S. persons should use the reexport designation on the SNAP-R form for submitting license applications for these activities. Applicants should specify that the license is required for the transaction under § 744.6 of the EAR in the “Additional Information” and should input “U.S. Person Activity” in the Special Purpose Field.

Licensing and Review Policy

- ***Do previously issued EAR license authorizations for items that are now captured under the parameters of one of the new ECCNs remain valid for the export, reexport, or transfer (in-country) of such items?***

Licenses previously issued for items now captured under the parameters of the new ECCNS remain valid until their expiration dates absent license-specific action by BIS to suspend, revoke, or impose additional conditions on the previously issued license.

- ***There are reports BIS issued authorizations to multilateral companies operating in China to continue their activities for one year. There are also reports BIS issued authorizations to companies to allow exports to China related to their supply chain. Are these letters to be shared with suppliers and customers? How does a company confirm that these letters are authentic?***

BIS has issued authorizations in limited circumstances to allow continued operations. A company who received the authorization should provide it to parties to the transactions so that they may jointly determine if the transaction meets the terms and conditions of the authorization.

Encryption

- ***If an end item subject to the EAR has encryption functionality (i.e., 5A992.c), but it also meets or exceeds the parameters in 3A090 or 4A090, are they subject to the license requirements for 3A090 and 4A090 items?***

ECCN 5A992 and 5D992 items that meet or exceed the parameters of 3A090 or 4A090 are subject to the license requirement and review policy for 3A090 and 4A090 items (see EAR §742.6(a)(9)), in addition to being subject to restrictions or requirements in Category 5 Part 2 (i.e., classification, licensing, and reporting requirements). Furthermore, computers, integrated circuits, “electronic assemblies” or “components” not specified in § 740.2(a)(9)(i) (i.e., ECCNs 3A090, 3B090, 4A090, or associated software and technology in 3D001, 3E001, 4D090, and 4E001) that meet or exceed the parameters of 3A090 or 4A090 are subject to license exception restrictions in § 740.2(a)(9)(ii) of the EAR, i.e., may not be exported, reexported, transferred (in-country) using License Exception ENC.

© Copyright 2025 Squire Patton Boggs (US) LLP

National Law Review, Volume XII, Number 333

Source URL: <https://natlawreview.com/article/bis-issues-first-faqs-chinese-supercomputing-and-semiconductor-manufacturing>